Metalsmith Recycling Company d/b/a Martin Bush Iron & Metal and its alter ego Second Street Recycling Company *and* United Electrical, Radio & Machine Workers of America, UE, Local 1139. Case 18–CA–13396

September 10, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On January 23, 1996, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions, and the General Counsel filed a cross-exception, a brief in support of his cross-exception, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

1. The judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to continue to recognize the Union and honor the collective-bargaining agreement was predicated on his finding that Second Street Recycling was an alter ego of Metalsmith Recycling Company d/b/a Martin Bush Iron & Metal (referred to by the judge and therefore hereafter referred to as Metalsmith). The judge found no antiunion motive in the cessation of operations by Metalsmith or the creation of Second Street, but rather based his alter ego finding on other factors.[2] Although the General Counsel agrees that a finding of union animus was not essential to the conclusion that Martin Bush and Second Street were alter egos,[3] he has excepted to the judge's failure to find that animus against the Union was a motivating factor in the creation and operation of Second Street. We find merit in the General Counsel's exception.

The judge concluded that Metalsmith had ceased operations because of bankruptcy and not to evade its obligations under the Act. He similarly concluded that its alter ego, Second Street Recycling, had been created to conduct cleanup work in order to relieve the Respondent's sole owner, Arthur Smith, of criminal liability for hazardous waste ordinance violations. Because the purpose for the creation of the alter ego was legitimate so far as the National Labor Relations Act is concerned, the judge also found an absence of antiunion motivation in Second Street's resumption of recycling operations. We disagree.

As the Eighth Circuit noted in *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 238 fn. 2 (8th Cir. 1986), the presence of a legitimate business reason for a change in corporate organization does not preclude finding alter ego status.[4] The record makes clear that Second Street Recycling was created in October 1994[5] not only to clean up hazardous waste left on the site when Metalsmith ceased operations the previous May, but also to resume the recycling functions that Metalsmith had performed. Although the Department of Public Works' enforcement of hazardous waste ordinances may have prompted the formation of Second Street Recycling at the beginning of October for cleanup operations, it did not compel Second Street to resume recycling operations in November, when its employees resumed performing the same functions they had performed under their collective-bargaining agreement with Metalsmith.

The record also indicates that Arthur Smith, who had been the sole owner of Metalsmith, was also the sole owner of Second Street when it began operating.[6] Smith contemplated reopening as a nonunion enterprise at least as early as August, when he told Union Field Organizer Rocco DeMaio of his intention. He indicated that he expected to reopen in September but would not be bound by the contract, and he asserted that he was "free" of the Union.

In addition, the credited testimony shows that Smith and John Simco, Second Street's nominal president, told employees that they would not reopen if the Union was going to represent them.[7] Thus, the creation of Second Street, in addition to having an objective of permitting Smith to escape further criminal liability for hazardous waste violations, also had an objective of escaping further dealings with the Union. The Board has previously found statements and actions similar to those of Simco and Smith sufficient to establish union animus, even where there were legitimate business reasons for the

[1] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.,* 325 NLRB 17 (1997).

[2] No exceptions have been filed to the judge's findings that Metalsmith and Second Street Recycling shared a substantial identity of ownership, management, supervision, business purpose, operations, premises and equipment, and customer base; that almost all of the employees performing recycling work for the Second Street Recycling had worked for Metalsmith; and that the employees performed substantially identical work for both companies.

[3] We agree with that proposition, which is consistent with long settled Board law. *Market King, Inc.*, 282 NLRB 876 fn. 3 (1987), and cases there cited ("evidence of unlawful antiunion motive in the creation of a corporation is relevant, but not essential, to a finding of alter ego status").

[4] In light of the court's discussion in *Crest Tankers* of its prior decision in *Iowa Express Distributions, Inc. v. NLRB*, 739 F.2d 1305 (8th Cir. 1984), cert. denied 469 U.S. 1088 (1985), we expressly disavow the judge's discussion in his decision of *Iowa Express Distributions*.

[5] All dates are 1994 unless otherwise indicated.

[6] Subsequently, in January 1995, John Simco acquired 20 percent of the stock.

[7] The judge found, and we agree, that these statements made by Smith and Simco telling employees that there would be no union and that it would not open for business with a union violated Sec. 8(a)(1) of the Act.

creation of a new corporate entity. See, e.g., *Haley & Haley*, 289 NLRB 649, 655 (1988), enfd. 880 F.2d 1147 (9th Cir. 1989); *Vulcan Trailer Mfg. Co.*, 283 NLRB 480, 486 (1987); and *Allcoast Transfer, Inc.*, 271 NLRB 1374, 1379 fn. 11 (1984), enfd. 780 F.2d 576 (6th Cir. 1986).

2. The Respondent contends that the judge's finding that Second Street, as alter ego of Metalsmith, is bound by Metalsmith's collective-bargaining agreement with the Union is precluded by the rejection of that agreement in Metalsmith's bankruptcy proceedings. We find no merit in this contention.

Rejection of a collective-bargaining agreement under the Bankruptcy Code constitutes a breach of the agreement. It does not invalidate or otherwise extinguish the agreement. 11 U.S.C. § 365(g); *O'Neill v. Continental Airlines, Inc.,* 981 F.2d 1450, 1459 (5th Cir. 1993) ("[11 U.S.C. § 365] does not invalidate the contract, or treat the contract as if it did not exist. To assert that a contract effectively does not exist as of the date of rejection is inconsistent with deeming the same contract breached."). Since the rejection of the Metalsmith contract in bankruptcy did not affect the agreement's continued existence, the judge correctly found that Second Street was bound to the agreement under ordinary alter ego doctrine.

Further, Second Street was never subject to the bankruptcy proceedings involving Metalsmith and is therefore not entitled to the protection of Section 365 or any other provision of the Bankruptcy Code. *Trout Air Freight*, 287 NLRB 1299, 1307 (1988); *Market King, Inc.,* 282 NLRB 876, 876–877 (1987); *Edward Cooper Painting,* 273 NLRB 1870, 1870 fn. 8 (1985), enfd. 804 F.2d 934 (6th Cir. 1986). Nor can Second Street avoid its liability as an alter ego of Metalsmith by claiming as an affirmative defense the protection that Metalsmith received in the bankruptcy proceeding. *Lumpkin v. Envirodyne Industries,* 933 F.2d 449 (7th Cir. 1991), cert. denied 502 U.S. 939 (1991); *NLRB v. Goodman*, 873 F.2d 598, 602 (2d Cir. 1989).

Accordingly, we find that Second Street is bound by the collective-bargaining agreement between Metalsmith and the Union and that it violated Section 8(a)(5) and (1) by refusing to continue recognizing the Union and honoring the agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Metalsmith Recycling Company d/b/a Martin Bush Iron & Metal and its alter ego Second Street Recycling Company, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Continuing to withhold recognition from, and failing and refusing to bargain with United Electrical, Radio & Machine Workers of America, UE, Local 1139, as the exclusive representative of employees in an appropriate bargaining unit of:

> All crane operators, mechanics, guillotine shear operators, welders, baler operators, load inspectors, metal technicians, shear operators, torch workers, warehouse workers, mobile equipment operators and trainees employed at its recycling business operated from 1601 North Second Street, Minneapolis, Minnesota; excluding office clerical employees, guards and supervisors as defined in the Act.

(b) Refusing to continue honoring the June 1, 1992 through May 31, 1995 collective–bargaining contract with the above-named labor organization for employees in the above-described appropriate bargaining unit.

(c) Telling employees that there will be no union and that it would not open for business with a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the above-named labor organization, as the exclusive bargaining agent for the employees in an appropriate bargaining unit described in subparagraph 1(a), above, and embody any agreement reached in a written contract.

(b) Honor the June 1, 1992 through May 31, 1995 collective-bargaining contract with the above-named labor organization for employees in the appropriate bargaining unit described in subparagraph 1(a), above, and make whole all employee and benefit funds, with interest for its failure to do so, in the manner prescribed in the remedy section of the judge's decision.

(c) Preserve and within 14 days of a request, make available to the Board and its agents, for examination and copying, all payroll, business and other records necessary to compute the make-whole remedy specified in subparagraph 2(b), above.

(d) Within 14 days after service by the Region, post at its Minneapolis, Minnesota facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that those notices are not altered, defaced or covered by any other material. In the event that, dur-

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ing the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent at any time since August 26, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that there will be no union and that we will not open for business with a union.

WE WILL NOT continue to withhold recognition from, nor fail and refuse to bargain with, United Electrical, Radio & Machine Workers of America, UE, Local 1139, as the exclusive collective-bargaining representative of employees in an appropriate bargaining unit of:

> All crane operators, mechanics, guillotine shear operators, welders, baler operators, load inspectors, metal technicians, shear operators, torch workers, warehouse workers, mobile equipment operators and trainees employed by Second Street Recycling Company at its recycling business operated from 1601 North Second Street, Minneapolis, Minnesota; excluding office clerical employees, guards and supervisors, as defined in the National Labor Relations Act.

WE WILL NOT continue to refuse honoring the June 1, 1992 through May 31, 1995 collective-bargaining contract with the above-named labor organization for employees in the above-described bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the above-named labor organization, as the exclusive bargaining agent for the employees in the appropriate bargaining unit described above, and embody any agreement reached in a written contract.

WE WILL honor the June 1, 1992 through May 31, 1995 collective-bargaining contract with the above-named labor organization, for employees in the appropriate bargaining unit described above, and WE WILL make whole all employees and trust funds, with interest on amounts owing for our failure to have done so.

METALSMITH RECYCLING COMPANY D/B/A MARTIN BUSH IRON & METAL AND ITS ALTER EGO SECOND STREET RECYCLING COMPANY

Joseph H. Bornong, Esq., for the General Counsel.
Robert L. Grossman (Grossman & Millard), of Minneapolis, Minnesota, for the Respondent.
Rocco DeMaio, of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Minneapolis, Minnesota, on June 22 and 23, 1995. On February 17, 1995, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on December 6, 1994,[1] and amended on February 14, 1995, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

This case presents primarily the issue of whether Second Street Recycling Company (the Respondent) has conducted an iron (nonmagnetic) and metal (magnetic) recycling business in Minneapolis[2] as the alter ego of the prior operator of that business, Metalsmith Recycling Company d/b/a Martin Bush Iron & Metal (Metalsmith). Metalsmith had been party to a collective-bargaining contract with United Electrical, Radio & Machine Workers of America, UE, Local 1139 (the Union),[3] but Respondent failed to recognize the Union as the exclusive collective-bargaining agent of the employees in the bargaining unit covered by that contract and, concomitantly, failed and refused

[1] Unless stated otherwise, all dates occurred during 1994.

[2] It is admitted that, at all material times Respondent has been an employer within the meaning of Sec. 2(2), (6), and (7) of the Act, based on a projection of its operations which, it is admitted, show that Respondent will annually sell goods valued in excess of $50,000 which will be shipped from Minneapolis directly to customers located outside the State of Minnesota.

[3] At all material times, the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

to honor the terms of that contract. Inasmuch as Respondent assertedly is the alter ego of Metalsmith, the General Counsel alleges that its refusal to continue recognizing the Union and honoring the terms of the collective-bargaining contract violated Section 8(a)(5) and (1) of the Act. The General Counsel further alleges that Respondent violated Section 8(a)(1) of the Act in late September when its owner and vice president, Arthur John Smith,[4] assertedly told employees that Respondent was not a union company and that its employees would no longer be represented by the Union.

For the reasons set forth in section II, infra, I conclude that the Board would find that, because of the substantial identity of structural and operational factors between them, Respondent is the alter ego of Metalsmith, even though the latter did not cease business, nor the former commence business, to evade collective-bargaining responsibilities under the Act, but instead Metalsmith had been forced to close and there was a hiatus in the iron and metal recycling operations between the closure of Metalsmith and commencement of operations by Respondent. Consequently, Respondent violated Section 8(a)(5) and (1) of the Act by refusing to continue recognizing the Union and honoring the collective-bargaining contract still in existence when Respondent opened its business. From that conclusion, it follows that Respondent violated Section 8(a)(1) of the Act when employees were told that Respondent was not a union company and that it would not open for business with a union.

B. Events Leading to Respondent's Initiation of Recycling Operations

As pointed out in subsection A, this case does not present a situation where an employer set out to avoid further recognition of a union, by closing one business and reopening under a different form and name. Rather, the instant case is rooted in a lawsuit followed by bankruptcy proceedings which led to closure of Metalsmith, followed by environmental proceedings which led to creation of Respondent and its eventual initiation of iron and metal recycling operations.

On June 4, 1991, a sale of assets was consummated. Metalsmith acquired certain assets from a partnership of the individual Martin Bush and four trusts. Those assets included ownership of some property and leases to other property located in Minneapolis, as described more fully in subsection D, infra. Recycling operations had been conducted on that property under the name Martin Bush Iron & Metal Co. at the business address of 1601 North Second Street. In addition, the assets puchased by Metalsmith included equipment and most inventory located on the property, as well as receivables and the right to use the name Martin Bush Iron & Metal Co.

The assets purchase was financed, at least to the greater extent, by loans from Fidelity Bank of Edina, Minnesota (Fidelity) and by a partnership of Martin Bush and his wife, Edythe Bush. During the period relevant to the instant proceeding, that partnership has been Mar-Bon Co., f/k/a Martin Bush Iron & Metal Co. (Mar-Bon). Fidelity was first lienholder; Mar-Bon the junior lienholder.

At the time of the assets purchase, Arthur John Smith and his now exwife held 80 percent of Metalsmith's stock. The remaining 20 percent was owned by Ed Bush, son of Martin and Edythe Bush. However, that 20 percent of Metalsmith's stock was acquired by the Smiths during the spring of 1993. During October 1993, Arthur Smith became sole shareholder of Metalsmith, apparently as a result of divorce proceedings. He remained its sole shareholder thereafter.[5]

Metalsmith operated the business until May 13, 1994, when it was forced to close because of bankruptcy proceedings. Those proceedings arose as a result of a dispute between Mar-Bon and Metalsmith over calculation of a purchase price adjustment for inventory which had not been recorded on the partnership's records. Each sued the other. Metalsmith filed a voluntary petition for Chapter 11 bankruptcy.

Smith continued operating Metalsmith, as debtor in possession. However, by order dated May 13, United States Bankruptcy Judge Gregory F. Kishel ordered that Metalsmith's "authority to use the cash collateral of Fidelity Bank and Mar-Bon Company is denied" and, further, terminated the automatic stay with respect to Fidelity's "enforcement of its lien rights as a secured creditor, as well as its right to set-off all funds of [Metalsmith] on deposit, and also as to its rights as mortgagee" for Metalsmith's Minneapolis business property.

By letter dated May 13, Fidelity's attorney advised Smith and all Metalsmith personnel to, in effect, vacate that property and "to secure all of the collateral and leave it in place . . . pending further action by the Bank." Smith and the other Metalsmith personnel complied with those instructions by close of business on May 13. In consequence, Metalsmith ceased operations on that date.

Probably no more would have been heard about this situation under the Act, had the department of public works for Hennepin County not inspected Metalsmith's property and discovered ordinance violations. By August, Metalsmith was in Chapter 7 bankruptcy and Smith had filed personal bankruptcy. Nevertheless, the department of public works notifed Smith that it considered him responsible for compliance with an ordinance requiring anyone who operates a business to "remove all hazardous waste and materials contaminated with hazardous waste prior to termination of operations." Failure to comply with those requirements constitutes a misdemeanor "deemed committed upon each day during or on which a violation occurs or continues."

By administrative orders dated August 24 and 26, Smith was given until specified September, October, and November dates to comply with specified acts to clean up Metalsmith's vacated Minneapolis property. Initially, he attempted to persuade Fidelity to hire him and others to do so. But, Fidelity refused to do so, since, as its attorney pointed out to Smith, Fidelity did not own Metalsmith's property, but only liens for which realty, equipment and inventory is collateral.

Fidelity was agreeable to selling its lien, thereby allowing a purchaser to foreclose it and take possession of the property, but not to selling it to Smith, himself. So, Smith contacted a friend, Harold Goldfine, who was willing to form and fund a new company, which would purchase and foreclose Fidelity's lien on Metalsmith property. To accomplish those actions, Smith personally set up Respondent, which was issued a certificate of incorporation on September 28. Goldfine would be sole shareholder of Respondent and its only director. However, junior lienholder Mar-Bon deterred Goldfine from following through on the arrangement.

[4] The parties stipulated that, while occupying those positions, Smith had been a statutory supervisor and agent of Respondent.

[5] The parties stipulated that, at all material times, Smith had been a statutory supervisor and agent of Metalsmith.

His attorney suggested to Goldfine, "[Y]ou better talk to Martin [Bush] and make sure this is okay with Martin, because you don't want to get your $45,000 into this company and find out that old Martin is just going to come take it." When Goldfine did so, Martin Bush said that Mar-Bon would exercise its junior lienholder rights should foreclosure of Fidelity's lien be attempted. As a result, Smith had to change direction to comply with the administrative orders.

An arrangement was worked out with Goldfine, whereby Smith purchased Respondent's stock for, testified Smith, "One dollar." Smith contacted John Simco, formerly yard manager for Metalsmith. Simco agreed to supply cash and credit needed for Respondent to conduct cleanup of Metalsmith's Minneapolis property. In return, Simco became Respondent's president and, on January 1, 1995, became the owner of 20 percent of Respondent's stock. Smith remained owner of the other 80 percent of that stock and still owned that percentage at the time of the hearing in the instant proceeding.

On October 1, Simco, as "manager" for Respondent, and Smith, as representative for Metalsmith, executed an arrangement, bearing the date "October 3, 1994," whereby Respondent would clean up Metalsmith's Minneapolis property. There was no impropriety by Metalsmith or Smith in taking that action. During August, its trustee in bankruptcy had abandoned all Metalsmith's assets. They reverted back to Metalsmith, the stock of which then was controlled by the trustee of Smith's personal bankruptcy. By letter dated October 3, the attorney for Fidelity stated that his client "continues to forebear from taking any action regarding the disposition of tangible collateral, including inventory and equipment, of Metalsmith." By letter dated October 11, that attorney notified Smith, Metalsmith's trustee in bankruptcy and Mar-Bon that "Fidelity . . . has abandoned its lien rights in equipment and inventory of" Metalsmith.

Under the above-mentioned arrangement with Metalsmith, Respondent functioned as a demotion company: one which did "clean ups," Smith testified. During that cleanup, Smith, as "Director" of Metalsmith, sent a letter, dated October 10, to the county department of public works. In it, he stated, inter alia, "I am attempting to negotiate a reopening of the business with the bank." Crane Operator Roger L. Piatt Jr. testified, without contradiction, that when he sought employment with Respondent to participate in the cleanup, "John Simco said that they were going to start to clean up the place and—and—and hopefully reopen."

Cleanup work was completed on November 13. On the following day, Respondent changed focus, testified Smith, ''to being a scrap recycling company." Those operations are discussed in subsection D, infra.

C. Relationship with the Union

As stated in subsection A, on May 13 Metalsmith had been party to a collective-bargaining contract with the Union,[6] having a stated term of June 1, 1992, through May 31, 1995. That bargaining relationship had existed since even before Metalsmith's assets purchase from the partnership in 1991. The contract's recognition article, article II, section 2.1, provides that Metalsmith "hereby recognize[s] the Union as the sole and exclusive and representative of the employees as their bargaining agency in all matters of Employer-Employee relationship." The contract's "EXHIBIT C" lists the job classifications represented under it as crane operator, mechanic, guillotine shear operator, welder, baler operator, load inspector, metal technician, shear operator, truckdriver, torch worker, warehouse worker, mobile equipment operator and trainee

On May 13, Smith notified the Union that Metalsmith was closing. There is no allegation of an unfair labor practice in connection with the closure, nor with respect to Smith's notice to the Union regarding it. The Union gave some thought to a plan whereby the employees would purchase Metalsmith's business. But, Field Organizer Rocco DeMaio testified that, during a telephone conversation on August 26, Smith said that the business was "not for sale." Asked about that conversation, Smith testified that what he had said to DeMaio was, "I didn't have anything to sell."

DeMaio testified that, during that same conversation, he had asked if Smith had any intention of reopening the business, to which Smith had said he did around September 9th." DeMaio further testified that he had said, "Don't forget we have a contract" and that he hoped Smith would enforce it. However, according to DeMaio, Smith retorted that "he didn't think so," and "I don't owe anybody anything and I'm free now."

Asked if he had talked to DeMaio about reopening Metalsmith, Smith answered merely, "Not to my recollection, no." Smith did not deny having made the remarks about reopening, during the telephone conversation, attributed to him by DeMaio. Moreover, Respondent acknowledged that Smith had received a letter from DeMaio, dated "9/3/94," stating that, during the telephone conversation,[7] "you informed me that you would be opening the scrapyard up on Friday, September 9, 1994," and reminding Smith that there is a collective-bargaining contract which "we expect that you will follow" with regard to all provisions.

Acting on a report that Metalsmith had reopened, in mid-October DeMaio went to North Second Street, accompanied by the Union's financial secretary, Karel Hoogenraad. There they discovered Smith and Simco in the office and several employees working on the property. DeMaio testified that he said he was there to ascertain if Smith was operating, and would recognize the Union and honor the collective-bargaining contract. According to DeMaio, Smith said, "[T]his isn't a good time right now," as the only activity being conducted was cleanup of the yard. When he asked, "What would be a good time," testified DeMaio, Smith said he did not know, but would "let you know[.]"

DeMaio and Hoogenraad returned to the North Second Street property on October 24. DeMaio testified that he told Smith "[t]he place is in operation," the Union should be recognized, and the contract should be honored. DeMaio handed Smith a handwritten grievance, protesting failure to recognize the Union and honor its contract. As a remedy, the grievance requested that the contract be followed and employees be recalled by seniority, with payment to them of backpay and benefits.

According to DeMaio, Smith said that he did not believe that the Union should be recognized, but he would check it out with his attorney and get back to DeMaio. Smith never did so, however. Nor did he respond to the Union's efforts to arbitrate the

[6] It also had been party to a collective-bargaining contract with the Teamsters for a truckdriver employed by Metalsmith. As discussed in subsec. D, he was not hired by Respondent. Accordingly, that bargaining relationship is not involved in the complaint's allegations.

[7] The letter obviously misstates the month of that conversation as "Friday 9/26/94."

dispute raised the grievance. So, the Union pursued the charge in the instant matter.[8]

One other aspect in connection with the Union should be addressed. As mentioned in subsection A, the complaint alleges that Respondent violated Section 8(a)(1) of the Act because, in late September, Smith told employees that Respondent was not a union company and that its employees would no longer be represented by the Union. The only witness who testified in connection with that allegation is Piatt. He had been a crane operator at the Minneapolis recyling business for 5 or 6 years before its May 13 closure and he was hired to participate in the cleanup of those premises. Then, he worked for Respondent after it opened for recycling business on November 14.

Piatt testified that in early November, before Respondent opened for business, but in connection with reopening recycling operations, "it was mentioned that we would start out at—the guys in the yard would get 12.50 an hour and the guys in the metal room would get 11.50 and the fact that there wouldn't be no union." Asked if Smith or Simco had said that, Piatt responded, "John said that and—they both said it at one time or another," and, "I think at least once." Piatt further testified that Simco had said, also, "they wouldn't open with it."

Asked during cross-examination if "from that date, the middle of November, when you started with [Respondent] until today has John Simco or Art Smith talked to you about the [U]nion," Piatt answered, "I don't recall having a conversation of [sic] them saying anything like that," and "I don't recall" either supervisor having made "comments to [Piatt] about whether it was a union shop or a nonunion shop[.]" However, he continued by reasserting that, before the November 14 opening for business, both Smith and Simco had said, "That they more or less wouldn't open with the [U]nion. They didn't want the [U]nion." Asked if they had merely implied that thought, Piatt answered, "No, they said it. That's what they said." Next asked if they had said, "We don't want the [U]nion." Piatt replied, "Well, I can't quote that but, yeah."

Simco did not deny having made such statements about the Union: "there wouldn't be no union," "that they more or less wouldn't open with the [U]nion," and, in essence, "We don't want the [U]nion." Instead, he denied only having made "a statement to any employees, to the effect that if the [U]nion came into [Respondent] that it would close." Yet, he did, in effect, volunteer that during a barroom conversation one night with a group of employees, one of whom had been Piatt, he had said that because he was ''tired of fighting over this stuff, if the [U]nion come [sic] in" that he would "quit." He added, however, "we were pretty well loaded that night" and that he had been, "[j]ust joking around," although he was unable to say whether any of the employees had laughed at his remark: "No, nobody said nothing."

Smith denied ever having told employees that he would not open to the public if the Union got back in or represented Respondent's employees. And he denied having said that Respondent "was not a union company[.]" He asserted, "Those are words that I would not use."

Yet, when shown his prehearing affidavit, Smith conceded that it did say, "When I hired the employees at [Respondent] I told them [Respondent] was not a union company in response to their questions as to whether the [U]nion was going to get back in." Confronted with that statement, Smith contradicted his denial quoted in the preceding paragraph by testifying, "that's what I said. That's what I said," although he seemingly was attempting to diminish, if not erase, that internal contradiction by adding to his answer, "I was asked does [Respondent] have a union contract. The answer is no." Moreover, he testified that when "employees asked me did [Respondent] have a union and I said no, he had told them, 'that I don't particularly like'" DeMaio.

D. Comparison of Metalsmith's Operations with those of Respondent

During 1994 there were three periods during which operations were conducted at the business operated from 1601 North Second Street in Minneapolis: by Metalsmith from the beginning of the year through May 13; by Respondent during the cleanup period from October 1 through November 13; and, by Respondent from November 14 through the end of the year, and during 1995 until the June hearing.

From its inception, Arthur Smith and his ex-wife had owned 80 percent of Metalsmith's stock, with Ed Bush owning the remaining 20 percent of its stock. By spring of 1993, Ed Bush ceased owning that 20 percent of Metalsmith's shares, leaving Smith and his ex-wife as sole owners. In October 1993, Arthur Smith became the sole owner of Metalsmith's stock. He held that ownership interest from then until Metalsmith closed on the following May 13.

As discussed in subsection B, Harold Goldfine had been slated to be Respondent's sole shareholder. But before Respondent could begin any operations, Goldfine pulled out of his arrangement with Smith. Smith then purchased all of Respondent's stock for a dollar. He remained Respondent's sole shareholder until January 1, 1995, when 20 percent of those shares were transferred to Simco, in return for money, credit, and equipment which Simco had furnished Respondent, to allow it to operate. That ownership situation—80 percent of the shares owned by Smith and 20 percent owned by Simco—continued unchanged through June 23, 1995.

Between October 1993, when his ex-wife was removed from its board of directors, and May 13, Smith had been the only director of Metalsmith. He also served as its president. Respondent's articles of incorporation—filed on September 27, before Goldfine pulled out of the arrangement with Smith—list[ed] Goldfine as Respondent's lone director. There is no evidence that he ever served in that capacity. Nor is there evidence as to who, if anyone, had been selected to succeed him. What is clear is that, since early October, Simco has served as Respondent's president and general manager, while Smith has occupied the position of vice president. However, there is no evidence whatsoever of any actions taken by Simco in the capacity of Respondent's president and general manager. So far as the record shows, executive and managerial decisions for Respondent have been formulated and implemented exclusively by Smith.

Respondent accepted no iron or metal for recycling from early October to mid-November. Its employees only processed inventory for sale, to comply with the administrative orders to clean up the property. Nevertheless, there is no particularized evidence that, in processing that inventory, those employees had performed any functions which differed from the work which they had been performing in the ordinary course of their

[8] No contention has been advanced that the dispute encompassed by the complaint should be deferred to the contract's disputes resolution procedure.

duties for Metalsmith prior to May 14, and the work which they would perform, in the ordinary course of their duties, for Respondent after November 13.

After November 13, Respondent engaged in the business of recycling iron and metal, as had Metalsmith. To be sure, there were differences in the magnitude of the two entities. As Smith explained, without contradiction, Respondent "is order magnitude 40 plus percent smaller than Metalsmith," since Respondent "is a severly undercapitalized firm" which

> has to function more as a feeder to local—other local entities in the industry as opposed to Metalsmith which was more of a stand alone operation that sold on a much wider geographic area, generally confined to the midwest but, [Respondent] generally sells only within the Twin Cities area, there are exceptions, but generally the statement is correct.

Metalsmith operated on several pieces of property: a basement and one-story structure at 1601 North Second Street; the main yard between that structure and another building, apparently not owned or leased by Metalsmith, at 1619 North Second Street; a yard—called the third yard—north of that building; another yard at 1701 North Second Street, where scrap and other usable items, such as pipe and pallets, were stored; and one other yard, referred to as the fourth yard, leased from Soo Line, where Metalsmith's personnel handled industrial scrap and grades of scrap received in prepared form, and which was used also as an overflow storage area.

At the time of the bankruptcy, Metalsmith owed $8000 to Soo Line's real estate department. Accordingly, Respondent has no access to the fourth yard. Nor does it use the yard at 1701 North Second Street, although there is no evidence that it could not do so. Unlike Metalsmith which stored processed metal awaiting shipment in the basement of the 1601 North Second Street structure, Respondent does not use that basement, principally because, Smith testified, "[T]he inventory turn over for [Respondent] is approximately three days, the inventory turn over for Metalsmith . . . was approximately 30 to 40 days." However, should Respondent experience an increase in materials received and, concomitantly, in inventory, so far as the evidence shows it could utilize all of the property, save for Soo Line's fourth yard, utilized by Metalsmith for its recycling operations. That is, it could use the basement at 1601 North Second Street and the yard at 1701 North Second Street, as well as the first story of the structure at 1601 North Second Street, the main yard and the third yard. Moreover, all of the property now under Respondent's control was available to it, so far as the record discloses, during the month-and-a-half cleanup period.

Of course, as stated above, during that cleanup period, Respondent had not been accepting iron and metal for recycling. During that period, it was attempting to dispose of scrap and other items left on the property. Further, since opening for recycling business, Respondent has narrowed the types of vendors from whom it obtains iron and metal. Thus, Smith testified that Metalsmith "purchased its materials generally . . . from three groups, number one being industrial accounts, number two would be what I call professional or semi-professional scrap haulers and then number three is the general public."

Firms and individuals in the latter two groups would bring material to Metalsmith's premises. For industrial accounts, ordinarily lugger containers were left at their premises for deposit of items such as steel, sheet iron, unprepared iron, aluminum, and copper. When full, lugger boxes were picked up by Respondent's truckdriver, in Respondent's truck, and transported to Respondent's premises for processing.

Simco testified that industrial accounts had provided 60 to 70 percent of the material which Metalsmith had received for recycling. Still, with regard to that estimate, he conceded, "I've seen a lot of lugger trucks come in there a lot, that's what I figured most of it was, I'm not too smart on business wise and stuff," and that, "Art takes care of all the paperwork." Yet, Smith never claimed that industrial accounts had represented so large a percentage of Metalsmith's business.

It is undisputed that Respondent no longer services industrial accounts. And, it no longer utilizes the lugger box system. Nevertheless, viewed from the perspective of employees represented by the Union, that change may not be so significant as might appear at first blush.

In the first place, Smith and Simco gave seemingly inconsistent testimony regarding the sources of Respondent's materials. Smith claimed, "Since the inception of [Respondent] the vendors have been almost exclusively professional and semi-professional scrap haulers"—persons, he testified, "who recycle[] scrap metal for a living as their primary source of income." But, questioned about where Respondent gets its materials, Simco answered, "From the public. From the street people I guess." In consequence, although Simco testified that Respondent was receiving its materials from vendors in the third group identified by Smith, Smith testified that Respondent obtains it from individuals and firms in the second of the three groups, which he enumerated. In short, it would appear that Respondent continues to receive materials from two of the three groups from which Metalsmith had received it.

Beyond that, absence of industrial accounts appears not to have had any meaningful affect on the materials processed by Respondent, when compared to those processed by Metalsmith. For, Simco conceded that grades of iron and metal received from industrial accounts would not differ from those received by Respondent from individuals who brought them to its premises: "No, it would all be the same." Indeed, agreed Simco, that would be true, because individuals might actually be bringing in materials obtained from industrial sources.

As to customers—or, as Smith referred to them, "consumers"—after processing the materials received from vendors, Smith testified, Metalsmith had sold to "mills and foundries that generally consumed or processed the material and their agents"—that is, he testified, "Somebody that buys the scrap and then converts it back . . . into a form that can then be used to start all over." Those firms were 'something very close to almost exclusively," testified Smith, the consumers to whom Metalsmith sold recycled iron and metal.

In addition, Metalsmith sold "certain used metal items, certain used equipment items," Smith testified, such as "a lot of racking outside the building in which use pipe, angle, channel structural pieces" had been stored when the business had been operated by the partnership of Martin Bush and the trusts. He further testified that "it was the practice of [Metalsmith] . . . to divert material that came in as scrap but was in fact in a condition to be resold as a reusable item to . . . set it aside and then instead of selling it for scrap we would sell it to the general public."

Respondent has not chosen to engage in sale of used items and equipment. During cleanup operations it sold processed iron and metal primarily to Kirschbaum-Krupp, Great Western,

Leder Brothers, and Scrap Metal Processors. It also made limited sales to Alter Scrap Processing of Minnesota; to IPSCO of Saskatchewan through a broker, Alter Trading; and, to Spectro Alloys. Several of these firms had been consumers of Metalsmith: Kirschbaum-Krupp,[9] Leder Brothers and Alter Trading.

During direct examination, Smith testified that, once it began operating in business, Respondent had sold "its material [to] a substantially different group of people than the group that was used by Metalsmith." He further testified that five consumers "account for 90 percent of all the sales of" Respondent, identifying two of them at that point as American Iron and Supply, and as North Start Steel. A "Detail Trial Balance" prepared by Smith for the period "9/1/94 to 12/31/94" shows relatively frequent consumers of Respondent to be, also, "David J. Joseph," "alter trading," and "Spectro Alloys Co." Of those five firms, at least four—Spectro Alloys, Alter Trading, North Start Steel and, "From time to time" according to Smith, American Iron and Steel—had been customers or consumers of Metalsmith. Moreover, Respondent never contended that its other consumers had been other than 'mills and foundries that generally consumed or processed the material and their agents[.]"

Virtually all of the employees who have performed recycling work for Respondent were employees who had been employed by Metalsmith during late April and May, and who had been represented by the Union. During the pay period ending April 27 and during the pay period ending May 13, those employees had been Todd Berg, Scott Baillargeon, Roger L. Piatt Jr., Marvin Roach, Scott Wheatman, Joseph Baillargeon, Craig Farden, John Kivi, Merlin Zuehlke and, on a part-time basis, Willie Sanders. Though listed on those two payrolls, apparently Farden had quit just before Metalsmith had closed.

When Respondent commenced cleanup operations, it first hired Kivi and Joe Baillargeon, followed closely thereafter by Piatt and Roach. Berg and Zuehlke were hired during early to mid-November. In addition, from October through the end of the year, Smith offered employment to Farden, Wheatman, and Scott Baillargeon, but each declined the offer. So far as the record discloses, only one employee who had not worked for Metalsmith was hired by Respondent to perform the type of work performed by Metalsmith's unit employees. That individual's first name is Tim, but his last name is not revealed by the evidence.

As to personnel not performing work covered by the Union's bargaining unit, Metalsmith had employed a full-time comptroller, but Respondent did not retain him. A truckdriver—Steven Kilborn—had been employed by Metalsmith to drive the truck for picking up lugger boxes at industrial accounts. He was represented by the Teamsters in a separate bargaining unit, as mentioned in footnote 6, supra. Inasmuch as Respondent has not serviced industrial accounts, it did not hire Kilborn and has not employed anyone else as a truckdriver.

Metalsmith employed two people—Linda Payne and Jackie Farden—who performed general secretarial work, paid customers and operated the iron scale. Neither is employed by Respondent. Instead, it employs Sandra Simco, on a part-time basis, to perform that work.

Before Metalsmith closed, Smith had served as general manager and warehouse supervisor. Simco had served as its yard supervisor. All of the unit employees reported to one or the other. That also has been the fact during the period of operation by Respondent. However, Smith testified that, since he has "taken on more of the inside administrative sort of things," he no longer manages the metal warehouse: "John, instead of just being the yard foreman now handles both the yard and the metal warehouse." But, though he testified as a witness for Respondent, Simco did not corroborate that description of reallocation of immediate supervisory responsibilities under Respondent.

With regard to operations conducted by Metalsmith, and its employees represented by the Union, Simco testified that unprepared iron and metal were received, stored until prepared by cutting it up and, then, shipped out by rail. That is essentially the same operation conducted by Respondent since November 14. Simco described how iron and metal purchased by Respondent is processed: "like see pieces of iron will come in over five feet long and over 18 inches wide and we put it in a shear and we cut it to make number one," after which it is, "Put in railroad cars and ship[ped] out." He agreed that the process followed by Metalsmith was pretty much the same one as Respondent follows: "Yeah, it's all got to be shipped out." Respondent adduced no evidence of any significant difference between the iron and metal processing procedure followed by Metalsmith before May 14 and that now being followed by Respondent since November 14.

The cleanup encompassed items, and requirements involving items, other than iron and metal, i.e., batteries, drums of oil, and other liquids and appliances. Still, the department of public works" administrative orders refer specifically to "scrap metal piles" and Simco acknowledged that Metalsmith had left "a lot of unprepared iron in that yard that [it] never cut up." As to disposition of that material, Respondent neither contends nor has adduced evidence that it had processed iron and metal during the cleanup in any manner differing from that followed by Metalsmith, and from the similar processing procedure which Respondent would follow, once it opened for business.

Items such as batteries, drums of liquid, and appliances had been received in the ordinary course of business by Metalsmith and, had there been no bankruptcy proceedings, presumably would have been processed for eventual disposition by unit employees. There is no evidence of any other personnel who likely would have done so. Nor has Respondent contended that some other group of employees would have been retained by Metalsmith to process those other items.

Two aspects of Respondent's iron and metal processing differ from that conducted by Metalsmith, at least based on some evidence presented. First, more limited equipment is operated and utilized by Respondent's employees, than when working for Metalsmith. For example, Metalsmith operated a baler which has been out of service for most of the time that Respondent has operated the iron and metal recycling business from 1601 North Second Street. Apparently, this work continues to be done, but Respondent has subcontracted it. Further, whereas Metalsmith used four or five cranes to process iron and metal, Respondent uses a lesser number, perhaps only the one which Piatt has been operating. And, of course, Respondent no longer uses the truck which picked up lugger boxes for Metalsmith.

[9] Called as an adverse witness by the General Counsel, Smith initially denied flatly that Kirschbaum-Krupp had ever bought from or sold to Metalsmith. However, when confronted with invoices showing sales to that firm on eight occasions during the latter half of 1993—in amounts between $249.20 and $1624.80—Smith conceded that Kirschbaum-Krupp had been a consumer of Metalsmith. This was another example of several incidents which tend to confirm my impression that Smith was not always being candid when he testified.

Nonetheless, the other equipment used by Respondent's employees to process iron and metal, so far as the record shows, is the same or the same type of equipment utilized by Metalsmith to achieve the identical business objective. Further, so far as the evidence discloses, all equipment left by Metalsmith on the premises, save for whatever may have been stolen during the nonoperating hiatus, has been available to Respondent.

Second, employees processing iron and metal for Respondent may more frequently perform more than one job, in the ordinary course of their workdays, than had been the fact when they worked for Metalsmith. Smith testified that when working for Metalsmith, "people tended to be more specialized and more restricted in their activities," while for Respondent "each of us has to pitch in where the job needs to be done."

The only job changes identified by Smith were that there is a reduced number of crane operators and, "the baler and the shear operator job has been combined, the . . . crane operator sometimes run[s] the shear," but 'that pretty much—as far as elimination goes, I think that covers it." However, Piatt, a crane operator for both Metalsmith and Respondent, testified that while working for Metalsmith, in addition to operating a crane, he also had worked in the warehouse, operating a forklift to help vendors unload their trucks, and had operated a front-end loader, to load rail cars with processed iron and metal for shipment. He further testified that he also had performed maintenance work. In short, his actual work experience with Metalsmith shows somewhat less than the strict specialization, which Smith generally portrayed as having existed. Beyond that, of course, all of the different duties performed by employees processing iron and metal for Respondent are ones encompassed by the unit work performed by Metalsmith's employees prior to May 14.

II. DISCUSSION

The doctrine of alter ego under the Act, in reality, is a subset of the doctrine of successorship. A second employer succeeds a first employer as an employing entity. In the general successor situation, however, the two employers are genuinely independent of, and separate from, each other. By contrast, the alter ego subset presents situations where the ostensible change of employers, in fact, is "merely a change in name or in apparent control" of the employing entity, with the result that the assertedly new employer is "merely a disguised continuance of the old employer," *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 101–104 (1942), resulting from "a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in ownership or management." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259 fn. 5 (1974).

Under Section 8(a)(5) of the Act, the distinction between successor and alter ego is significant. For, a successor employer is obliged only to recognize and to bargain with the exclusive representative of its predecessor employer's employees, but not to honor a collective-bargaining contract which existed between that predecessor and that representative. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). In contrast, "An alter ego employer will be bound by the terms of a collective bargaining contract entered into by" the predecessor and the employees' exclusive representative. *NLRB v. Electrical Workers IBEW Local 46*, 793 F.2d 1026, 1029 (9th Cir. 1986).

In determining whether an alter ego relationship exists, the Board considers a number of factors. Thus, it stated in *Fugazy Continental Corp*., 265 NLRB 1301, 1301–1302 (1982):

> Among these factors are: common management and ownership; common business purpose, nature of operations, and supervision; common premises and equipment; common customers, i.e., whether the employers constitute "the same business in the same market"; as well as the nature and extent of the negotiations and formalities surrounding the transaction. We must also consider whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under that Act.

In the context of the instant case, that last factor is a significant one.

In *Fugazy Continental* the Board stated that: "[N]o one of [the above-enumerated factors], taken alone, is the sine qua non of alter ego status." (Id. at 1301.) With specific regard to the factor of motive for creation of the second employer, the Board has held that "evidence of unlawful antiunion motive in the creation of a corporation is relevant, but not essential, to a finding of alter ego status." *Market King, Inc*., 282 NLRB 876 fn. 3 (1987). Although it has more recently allowed that "the absence of union animus nevertheless generally militates against finding a 'disguised continuance' of the predecessor," *Perma Coatings*, 293 NLRB 803, 804 (1989), the Board has never abandoned altogether its position that "unlawful antiunion motive in the creation of a corporation is relevant, but not essential, to a finding of alter ego status." Id. But, that position is not shared universally.

As is pointed out in *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 146–147 fn. 4 (3d Cir. 1994), "three different approaches" have been taken by the United States Courts of Appeals with respect to the factor of unlawful motivation or illicit intent, in analyzing alter ego allegations. Here, the significant approach is that which has been adopted by the United States Court of Appeals for the Eighth Circuit, since the instant case arises within its jurisdication. In *Iowa Express Distribution, v. NLRB*, 739 F.2d 1305 (1984), cert. denied 469 U.S. 1088 (1984), that circuit court concluded—or, at least, is portrayed as having concluded—that evidence of unlawful motive or illicit intent is required to establish the existence of an alter ego relationship.

If that interpretation of *Iowa Express Distribution* is the correct one on that issue, then the instant case cannot be enforced. For, as pointed out in section I,A, and as described in section I,B, evasion of responsibility under the Act, by eliminating the statutory obligation to continue recognizing and bargaining with the Union, was not a even a consideration for closing Metalsmith and for forming and opening Respondent.

"For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced." *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). "Administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit, unless the Board has a good faith intention of seeking review of the particular proceeding by the Supreme Court." *NLRB v. Ashkenazy Property Management Corp*., 796 F.2d 479 (9th Cir. 1987).

Obviously, administrative law judges have no way of ascertaining, when hearing and deciding cases, what intentions the Board may have with respect to seeking review of its positions rejected by circuit courts of appeals within whose jurisdiction

those cases arise. Clearly, decisions concerning seeking review are ones reserved to the Board under the Act. In that connection, the Board has never retreated from its direction "that administrative law judges are to apply established Board precedent that has not been reversed by the Board or the Supreme Court." *Regency at the Rodeway Inn*, 255 NLRB 961 fn. 2 (1981). Accordingly, inasmuch as I am obliged to follow that direction, absence of unlawful motive shall be evaluated as but one factor in resolving the ultimate issue of whether Respondent is the alter ego of Metalsmith.

In situations where an employer has ceased operations for reasons unrelated to a union, and where there is no evidence that the second employer had been "conceived or established as a 'disguised continuance' for the purpose of evading . . . contractual obligations or in an effort to avoid dealing with the union representative of its employees," *Eagle Express Co*., 273 NLRB 501, 502 (1984), the Board held that it "generally will find alter ego status only if the two enterprises in question have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision." A preponderance of the credible evidence establishes that each of those factors exist in the instant case.

Arthur Smith had been Metalsmith's sole shareholder for over 6 months before that employer closed. He became sole shareholder of Respondent when it commenced cleanup operations and continued as such for a month-and-a-half after it opened for business, on November 14. To be sure, on January 1, 1995, 20 percent of Respondent's stock would be transferred to Simco. Yet, as a practical matter, Smith's retention of 80 percent of that stock left him no less "the dominant force in establishing the business purpose of" Respondent, *Continental Radiator Corp*., 283 NLRB 234, 235 (1987), after January 1, 1995, than before that date. Moreover, that dominant position with Respondent did not differ significantly from the one which Smith had occupied as Metalsmith's sole shareholder prior to May 14. Consequently, the evidence does establish the existence of the factor of substantial identity of ownership between Metalsmith and Respondent.

Smith's dominant ownership position is also a factor relevant to the factor of substantial management identity between the two employers. Though Smith had been president of Metalsmith, while Simco is president of Respondent and Smith holds only the title of Respondent's vice president, as pointed out in section I,D, there is no evidence that Simco's title is other than nominal—no evidence that he has made any executive or managerial decisions concerning Respondent's business purpose or direction. Indeed, Simco acknowledged that he is "not too smart on business wise and stuff" and that Smith "'takes care of all the paperwork[.]" So far as the record discloses, Smith, without consultation with Simco, has made all decisions concerning Respondent's business purpose and direction, as he had done when serving as Metalsmith's president. Consequently, there is no basis for inferring or concluding other than that substantial identity of management exists between Metalsmith and Respondent.

Since November 14, the business purpose of Respondent has been the same as that of Metalsmith: recycling iron and metal. That also was the business purpose of Respondent during the cleanup period, from October 1 through November 13. As discussed in section I,C, both the employees and the Union were told that once cleanup was completed, Respondent intended to try to open for business. Further, although Respondent did not accept new materials for recycling during the cleanup period, the recycling operations in which its employees did engage, so far as the evidence discloses, were the same as recycling operations conducted by Metalsmith and those which would be conducted after November 13 for Respondent. Still, discussion of the factor of identity of operations must include three other points.

First, Respondent's operations are smaller, downsized from those conducted by Metalsmith. But, of itself, contraction of operations does not "establish . . . that the Respondent . . . is a completely new entity." *Coastal Cargo Co*., 286 NLRB 200, 203 (1987). With the exception of collection and sale of used metal items and equipment, discussed below, recycling operations which Respndent has been conducting are, as Simco conceded, identical to those which Metalsmith had conducted: cutting up iron and metal, loading it onto railroad cars, and shipping it out.

Second, as to collection and resale of used metal items and equipment, there is no particularized evidence that such activity had been a significant portion of Metalsmith's operations, as opposed to a mere incidental aspect of its recycling operations. So far as the evidence discloses, those items were set aside when it was convenient to do so and, then, were sold at Metalsmith's convenience. Of greater importance, given the Supreme Court's emphasis on employee perspectives, *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 43–44 (1987), under successorship doctrine, of which alter ego doctrine is a subset, there is no evidence that collection and sale of used items and equipment had been a significant aspect of the ordinary duties of Metalsmith's employees represented by the Union.

Third, during the cleanup period, those employees recycled items in addition to iron and metal: drums of liquid, and appliances. However, those items had been received by Metalsmith in the ordinary course of its business. Presumably, at some point Metalsmith would have recycled them. As pointed out in section I,D, there is no evidence that personnel other than unit employees would have performed that recycling work for Metalsmith. So far as the record shows, that work would have been performed by employees represented by the Union. In light of this and the foregoing considerations, a preponderance of the evidence establishes that there is a substantial identity of operations between Respondent and Metalsmith.

With respect to premises and equipment, the property which Respondent occupies is the same as that owned and leased by Metalsmith, save for the fourth yard which had been leased from Soo Line. But, there is no evidence which would permit an inference or conclusion that, without control of the fourth yard, Metalsmith would have been a significantly different entity or business operation. That is, there is no evidence that the fourth yard had been so integral to Metalsmith's recycling operation that, without access to it, Respondent cannot be regarded as substantially identical to Metalsmith. At best, loss of access to Soo Line's leased property constitutes no more than a contraction which, the Board has held, does not give rise to "a completely new entity." *Coastal Cargo Co*., supra.

To be sure, Respondent has not been using the basement of the 1601 North Second Street structure, nor the yard at 1701 North Second Street. Nonetheless, it retains control of both those areas of its overall premises. Should it choose to do so, nothing in the record shows that Respondent would be unable to begin using the basement and 1701 North Second Street yard in connection with its recycling operations, just as Metalsmith

had done. Respondent has neither contended, nor presented evidence to support a contention, that it has abandoned altogether, and has no intention of ever using, those two portions of the overall premises available to it.

As to equipment, which is used, it is undisputed that Respondent no longer uses lugger boxes. Still, there is no evidence that use of lugger boxes had been integral to Metalsmith's recycling of iron and metal—the work performed by employees whom the Union had represented. To the contrary, lugger boxes were but a means of transporting material to Metalsmith's property for unit employees to process it. Like the no-longer-used truck used to transport lugger boxes, there is no evidence that discontinuance of the lugger box system, of itself, had any significant affect on the processing of iron and metal, nor on the processing work of employees. Moreover, there is no evidence that would warrant a conclusion that, should it decide to resume the lugger box system and be able to acquire the equipment needed to do so, Respondent would be unable to resume that business. Certainly, it has not contended that it has no intention of ever doing so. Obviously, there are industrial accounts willing to do business with Respondent. For, Smith testified that he had so far been turning down such business, when he had been approached about having Respondent perform it.

Of course, discontinuance of the lugger box system has eliminated the need for Respondent to employ a truckdriver. However, like the lugger box system, itself, there is no showing that a truckdriver is an integral component of the process of recycling iron and metal. Rather, he performed the limited function of transporting material to Metalsmith's premises, for recycling. Further, the truckdriver had been represented in a unit separate from the unit represented by the Union. Accordingly, his absence has not been shown to have a significant affect on either the process of recycling iron and metal, nor on the work performed by employees in the unit for which the Union served as bargaining agent.

Save for whatever may have been stolen from the premises during the mid-May through September hiatus in operations there, all other equipment left by Metalsmith was available to Respondent. Some of it was in a condition too poor for it to be usable and had to be replaced. But, there is no evidence that equipment purchased had differed in type from that which it replaced—no showing that the newer equipment was so substantially different that it changed either the nature of the recycling process or the nature of recycling jobs performed by Respondent's employees. So far as the evidence shows, Respondent's employees continue to use the same and same type of equipment as when most of them worked for Metalsmith.

To be sure, Respndent has not been using the baler, but has apparently subcontracted the work done by the baler. Nevertheless, there is no basis for concluding that nonuse of the baler resulted from a decision to change the method of recycling iron and metal. To the contrary, Respondent initiated operations using the baler. When it broke down, apparently in late November, Respondent then decided to forgo repairing it and subcontracted that work. But, there is no evidence that Respondent plans to keep doing so—no evidence that Respondent will never repair or replace the baler and, once more, have its own employees perform that work. Certainly, Respondent has not contended that it plans to never again have its own employees operate the baler. Given these considerations, and the ones discussed in the preceding paragraphs, the evidence does show a substantial identity between the property and equipment of Respondent and that of Metalsmith.

As to suppliers and customers, Respondent has chosen not to service industrial accounts. Still, as pointed out above, in connection with the lugger box system, there is no evidence that it has abandoned altogether the prospect of ever servicing those accounts. Beyond that, Simco conceded that Respondent might well be receiving the same types of materials, as industrial accounts had provided to Metalsmith, from at least one of the other two primary sources of materials for Metalsmith: the general public.

Despite Smith's and Simco's unconvincing efforts to narrow further the sources from whom Respondent receives materials, their testimony shows that, as had Metalsmith, Respondent receives iron and metal for recycling from the general public and from professional and semiprofessional scrap haulers. The iron and metal received from persons and entities in those two groups, so far as the specific evidence discloses, is essentially the same as Metalsmith had received. No particularized evidence of any significant difference has been adduced.

As to customers or consumers, Smith acknowledged that 90 percent of Respondent's sales have been made to five consumers. The evidence, reviewed in section I,D, reveals that four of them had been consumers of Metalsmith. There is no showing that the fifth one—"David J. Joseph"—is outside the class of "mills and foundries that generally consumed or processed the material and their agents" to which Metalsmith sold processed iron and metal. Indeed, there is no particularized evidence of significant sales by Respondent to any consumers outside of that general class. Consequently, Respondent obtains its material from sources from which Metalsmith also had obtained it and, moreover, has "a substantially identical customer base," *Continental Radiator Corp*., supra, 283 NLRB at 236, to that of Metalsmith.

As to supervisors, as set forth in section I,D, Smith's testimony that Simco now directly supervises metal warehouse operations, as well as yard operations which he also supervised for Metalsmith, was not corroborated by Simco. "Even if [Smith] ha[s] less influence in the daily operation .of [Respondent] than he did regarding that of [Metalsmith] the evidence supports a finding that [Metalsmith] and [Respondent] have substantially identical" supervision. *Haley & Haley, Inc*., supra.

Those two individuals remain the only two supervisors of iron and metal recycling operations conducted from 1601 North Second Street. Employees performing that work are subject to supervision by no other person. There is no evidence that any expansion to the metal warehouse of Simco's supervisory duties, as a practical operational matter, has had any affect whatsoever on employees working there or in the yard. That is, there is no evidence that employees working in either location have experienced any specific changes in their supervision, since beginning work for Respondent, when compared to their supervision when working for Metalsmith. Nor, given Smith's ownership of 80 percent of Respondent's stock, is there any evidence or basis for inferring that Simco exercises any significant supervisory power independent of Smith's approval. Smith remains on the premises. He is the only other person to whom employees could report for supervision, particularly whenever Simco is absent or occupied elsewhere. In these circumstances, the evidence establishes substantial identity of supervision between Metalsmith and Respondent.

As mentioned in section I,D, Smith testified that some work performed by unit employees for Metalsmith is no longer performed by Respondent's employees. Yet, aside from collection and sale of usable items and equipment, discussed above, he identified only operation of the baler and "sometime" operation of a shear by the crane operator, presumably Piatt. Piatt testified, however, that he had performed work in addition to operating a crane when he had worked for Metalsmith. Indeed, notwithstanding Smith's generalized and unsupported testimony about specialization of work by unit employees for Metalsmith, Piatt's more particularized testimony tends to show that Metalsmith's employees performed a multiplicity of tasks—that they were not restricted, in the ordinary course of their workday, to performance only of duties in their job classifications.

Of course, as pointed out above, Respondent did operate the baler during the cleanup period and when it opened for business. It ceased doing so, not because of a decision to abandon its operation by its own employees, but because the baler broke down. Respondent has not contended that a firm decision has been made to never again have its own employees operate a baler. Instead, it has chosen to not yet have the baler repaired or replaced.

Save for baler operation, so far as the evidence shows, Respondent's employees have continued to perform the same overall duties as they performed when working for Metalsmith and when represented by a bargaining agent which their employer had been willing to recognize. Even during the cleanup period, as pointed out above, they recycled iron and metal, as well as an indeterminate amount of other materials received by Metalsmith in the ordinary course of its business, exercising the same skills and performing the same duties as when working for Metalsmith before May 14 and for Respondent after November 14. Consequently, throughout 1994 the employees represented by the Union at 1601 North Second Street performed substantially identical work.

Under *Eagle Express Co.*, supra, the foregoing conclusions suffice to establish alter ego status. Still, three other factors should not pass without comment. First, there was a 4–1/2–month hiatus in all operations from 1601 North Second Street and a 6-month hiatus in receiving materials there. But, in the context of successor doctrine, the Supreme Court has held that "a hiatus is only one factor" to be considered and, more importantly, "is relevant only when there are other indicia of discontinuity." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 45. There seems no logical reason to assume that the Court would reach a contrary conclusion under the doctrine of alter ego. The same factual pattern, of one employer at least ostensibly succeeding another, underlies the latter, just as sucessorship involves one employer actually succeeding another.

In *Fall River Dyeing*, the Supreme Court was not deterred from finding successorship merely because there had been a 7-month hiatus in operations. Here, the hiatus in actual overall business operations was only 6 months: from May 14 through November 13. Moreover, recycling operations were conducted by Respondent at 1601 North Second Street even earlier: from October 1 through November 13, with only receipt of materials not occurring. Accordingly, the actual hiatus in work there by unit employees was only 4-1/2 months.

Respondent has presented no evidence showing that either hiatus had any significant affect on either the nature of recycling business conducted before and afterward. To the contrary, as concluded above, since the hiatus there has been substantial identity of ownership, management, business purpose, operations, equipment, customers, and supervisors to that which had prevailed before May 14. Moreover, almost all of the employees performing recycling work on and after October 1 had been employees who had worked for Metalsmith before May 14. So, too, were the three employees who were offered, but did not accept, employment with Respondent.[10] Consequently, standing alone, the hiatus does not affect the conclusion, in light of the other above-discussed considerations, that Respondent is the alter ego of Metalsmith.

Second, the hiatus occurred essentially due to events arising from bankruptcy proceedings. In some situations that might be a relevant consideration. See, e.g., *Blazer Corp.,* 236 NLRB 103 (1978), and administrative law judge's discussion in *Kanowsky Furniture, Inc*., 314 NLRB 107 (1994). However, in the instant case, other than being the proceeding which eventuated in the hiatus—leading Metalsmith to close and culminating in the opening of Respondent—the fact of the bankruptcy proceeding, standing alone, had no meaningful affect on the recycling operation.

Metalsmith's trustee in bankruptcy never attempted to engage in recycling operations, in place of Smith, and never employed anyone to do so. As a result, the situation was no different than had Metalsmith chosen to shutdown temporarily—for renovation or for whatever reason—and, then, reopened under a different corporate form and name. For whatever reason, the substantially identical recycling business merely closed and later reopened, when viewed from the perspective of employees and, also, from the perspective of the Act's policy of industrial peace." *Fall River Dyeing Corp. v. NLRB*, supra at 43.

Finally, returning to the initial consideration discussed in this section, it is clear not only that Smith did not close Metalsmith to avoid obligations arising under the Act, but he did not close it voluntarily. He was forced out. And there can be no doubt that at that point he had no prospect or intention of resuming recycling operations at 1601 North Second Street. Similarly, he was forced back into recycling materials left on the premises, by the department of public works" administrative orders. But for them, there is no evidence that Smith ever would have resumed operations from that address.

Yet, he did so. Furthermore, no element of compulsion obliged him to open Respondent for business following the cleanup. That had been strictly a voluntary decision by Smith. And, as shown by remarks made to the Union and to employees described in section I,C, it had been a course contemplated by Smith since at least late August.

Even though Metalsmith's closure was compelled, analytically that type of closure seems not so unique as to warrant some type of modification of the alter ego doctrine. For example, a fire could force closure of a business and, at that time, apprear to have forced permanent closure. But, if funding eventually surfaces, allowing reconstruction which enables that business to reopen, there would be no basis under the Act for dissolving a historic bargaining relationship, solely because of

[10] There is no allegation in the complaint of constructive discharge concerning these three employees. And there is no evidence as to what they were told when employment had been offered to them by Respondent. Still, they may be entitled to be made whole under the remedy for Respondent's refusal to continue honoring the 1992–1995 contract with the Union.

change in employer anticipation between the time of closing and the date when reopening became a realistic alternative.

"The underlying purpose of [the Act] is industrial peace." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). Congress viewed industrial peace as being promoted by the collective-bargaining process. There can be no dispute, on the basis of the record in the instant case, that Smith would have continued operating Metalsmith, had he been allowed to do so. Nor can it reasonably be argued that he would not have resumed operation of Metalsmith, had that been a feasible alternative course. It was not. So, when compelled by circumstances to clean up Metalsmith's premises, he formed a new company and set out to comply with that obligation and, in addition, to resume operating an iron and metal recycling business at 1601 North Second Street.

Had Smith been able to accomplish the cleanup and reopening by resuming operation of Metalsmith, there seems no reason under the Act for depriving employees of their incumbent bargaining agent and of the benefits of the collective-bargaining contract, which it had negotiated for them. That result would not be altered by Smith's expectation, at the time of closing Metalsmith, that he would not be able to resume operating it. Given the substantial identity of the factors discussed above, there seems no logical reason to treat this situation differently merely because the reopening occurred as a different entity.

Furthermore, while it is quite clear that Metalsmith was not closed and Respondent created it for the specific purpose of eliminating the Union, as the representative of the recycling employees, it also is clear that Smith and Simco chose to take advantage of those events to do so. Though he may have been drinking when he made his barroom remarks to employees, described in section I,C, Simco never claimed that those remarks about being "tired of fighting" concerning the Union, and quitting if the Union came into Respondent, did not reflect his actual attitude toward continued representation of Respondent's employees. Those admitted statements also tend to support Piatt's largely undenied descriptions of remarks by Simco and Smith, to the effect that Respondent would not open if the Union was going to represent its employees. They tend also to support DeMaio's testimony that Smith had said that closure of Metalsmith left him "free" of the Union.

There is no evidence that any of Metalsmith's employees had been dissatisfied with their representation by the Union. There is no evidence whatsoever that, since beginning work for Respondent, any of those employees—nor, for that matter, the employee whose first name is Tim—had no longer desired representation by the Union. In these circumstances, the absence of illicit motive for the closure and reopening weighs less heavily in Respondent's favor than might be the fact in other circumstances. In light of that conclusion, and given the substantial identity of factors described above between Respondent's business and that of Metalsmith, I conclude that a preponderance of the credible evidence establishes under Board law that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to continue recognizing the Union and by refusing to continue honoring the 1992–1995 collective-bargaining contract.

In those circumstances, an employer violates the Act by telling employees that there would be no union and that it would not open for business with a union. I credit Piatt's testimony that those statements had been made by Smith, as well as by Simco. By those statements to employees, Respondent violated Section 8(a)(1) of the Act, as well.

CONCLUSION OF LAW

Metalsmith Recycling Company d/b/a Martin Bush Iron & Metal and its alter ego Second Street Recycling Company has committed unfair labor practices affecting commerce by refusing to continue recognizing United Electrical, Radio & Machine Workers of America, UE, Local 1139 as the exclusive collective-bargaining representative of employees in an appropriate bargaining unit of all crane operators, mechanics, guillotine shear operators, welders, baler operators, load inspectors, metal technicians, shear operators, torch workers, warehouse workers, mobile equipment operators, and trainees employed by Second Street Recycling Company at its recycling business operated from 1601 North Second Street, Minneapolis, Minnesota; excluding office clerical employees, guards and supervisors as defined in the Act, and by refusing to continue honoring the collective-bargaining contract with that labor organization effective from June 1, 1992, through May 31, 1995, in violation of Section 8(a)(5) and (1) of the Act, and by telling employees that there would be no union and that it would not open for business with a union, in violation of Section 8(a)(1) of the Act.

REMEDY

Having concluded that Metalsmith Recycling Company d/b/a Martin Bush Iron & Metal and its alter ego Second Street Recycling Company has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to continue recognizing and bargaining with United Electrical, Radio & Machine Workers of America, UE, Local 1139—as the exclusive bargaining representative of all employees in an appropriate bargaining unit of all crane operators, mechanics, guillotine shear operators, welders, baler operators, load inspectors, metal technicians, sheer operators, torch workers, warehouse workers, mobile equipment operators and trainees employed by Second Street Recycling Company at its recycling business operated from 1601 North Second Street, Minneapolis, Minnesota; excluding office clerical employees, guards and supervisors as defined in the Act—and to continue honoring the terms of the collective-bargaining contract with that labor organization, effective from June 1, 1992, through May 31, 1995. It also shall be ordered to make whole all employees in that appropriate bargaining unit for lost wages and benefits, calculated in accordance with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), and with regard to fringe benefits, to remit any payments it may owe to those funds, determined in the manner prescribed in *Merryweather Optical Co*., 240 NLRB 1213 (1979), and to reimburse employees for any losses or expenses they may have incurred because of its failure to make payments to those funds, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 1 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1991), with interest on any money owing, to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]